ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION III

CA06-703

April 4, 2007

PAUL WOODARD APPELLANT	AN APPEAL FROM CLARK COUNTY CIRCUIT COURT [NO. CIV2005-51]
v.	
MURIEL HASLEY, Trustee of the Muriel J. Hasley Revocable Trust APPELLEE	HONORABLE JOHN A. THOMAS, CIRCUIT JUDGE AFFIRMED

Paul Woodard appeals from an order refusing to grant him a prescriptive easement in a road that passes over land owned by the Muriel J. Hasley Revocable Trust.[1] Woodard argues that he was entitled to the easement because he produced unrebutted evidence that he had used the road continuously and without permission for eighteen years; that his right to an easement should not be defeated by Mrs. Hasley's land being unenclosed and unimproved; and that he was not required to show that Mrs. Hasley had actual notice, as opposed to constructive notice, of his adverse use of the road. We find no error and affirm.

[1] For ease of reading, we will refer to Mrs. Muriel Hasley, trustee, as the owner of the trust property.

Both parties own large parcels of land that are thick with timber. Mrs. Hasley's property has been wild and unenclosed since approximately 1960. The road at issue, which the parties called the woods road, was in fact more of an unimproved lane or trail. It originated on Mrs. Hasley's land, opening south off an east-west thoroughfare. It then crossed south onto Woodard's property.

Woodard bought his land in 1985 and has primarily used the property for a hunting club. When he first visited the property with his grantor, Charles Pennington, he used the woods road for access. Not long after his purchase, he constructed fire lanes and built a cabin, during which time trucks and bulldozers traveled the woods road. Woodard also put up a gate at the point where the woods road entered his property. According to his testimony, he normally went onto his property six to twelve times per year—during the October-through-January hunting season and a few other times. Woodard said that he never sought anyone's permission to use the road and never even spoke to Mrs. Hasley until 2003. His predecessor, Pennington, testified that, while he could not say that he had actual permission from Mrs. Hasley to use the woods road, he "assumed" that he could use it during the time of his ownership.

Mrs. Hasley testified that she was aware of Pennington's sale to Woodard in 1985 and knew that Woodard, like Pennington, used the woods road for access. She said that she never expressly granted or denied Woodard permission to use the road, but he used it "seldom," and she considered his use "permissioned." Further, she said that she had no objection if Woodard wanted to "borrow" the road because she was "brought up to be neighborly and

helpful." In fact, she noted, it was probable that others in the area also used the woods road since it was not fenced or posted.

In August 2003, Mrs. Hasley's sister was driving across the Hasley property when she noticed a piece of heavy equipment near the woods road. She also noticed that the brush in the area had been cleared and the woods road had been widened. She called Mrs. Hasley and asked if she was cutting timber, and she replied that she was not. Mrs. Hasley decided to check into the matter and, accompanied by family members, went to view the woods road area.

When she arrived, she saw that there were large ruts in the ground and that the entire area had been "plowed up and spread around." She could also tell that some small sassafras trees had been pushed down. Photographs taken at the time show long, deep ruts in the road; a dirt road of considerable width leading to Woodard's gate; and a large, dirt-covered area outside his gate, which Mrs. Hasley described as a "turn-around." Mrs. Hasley immediately put up a home-made no-trespassing sign. However, the next day, she discovered that the sign had been thrown aside, the dirt had been graded, and some gravel had been put down. Prior to this activity, she said, the woods road was so narrow that, when driving on it, limbs brushed against the vehicle.

Woodard explained that, in 2003, he had some logging done on his property, and the logging trucks left ruts in the road. He said that he spread some dirt on the ruts to fill them in, but he denied widening the road or cutting anything as Mrs. Hasley claimed. He also said

that, other than using the woods road for access, he had not maintained it or conducted other activity on it prior to 2003.

The parties were unable to resolve their differences regarding Woodard's work on the road, and Woodard filed suit, seeking a prescriptive easement in the road. The court denied his request, and this appeal followed.[2]

An action seeking a declaration of a prescriptive easement is reviewed de novo on the record, and we will not reverse a trial court's findings of fact unless they are clearly erroneous. *Bobo v. Jones*, 364 Ark. 564, ___ S.W.3d ___ (2006); *Carson v. Drew County*, 354 Ark. 621, 128 S.W.3d 423 (2003). We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id*.

A prescriptive easement may be acquired in a manner similar to adverse possession. *See Carson*, *supra*. The plaintiff must show by a preponderance of the evidence that his use has been adverse to the true owner and under a claim of right for seven years. *See id*; *Drummond v. Shepherd*, ___ Ark. App. ___, ___ S.W.3d ___ (Jan. 24, 2007). Overt activity by the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. *Id*. The use of wild, unenclosed, and unimproved land is presumed to be permissive, until the person using the land for passage, by his open and notorious

[2] Mrs. Hasley filed a counterclaim to require Woodard to restore the road to its former condition. The court denied her counterclaim, and she does not appeal from that ruling.

conduct, demonstrates to the owner that he is claiming a right of passage. *See id*. The determination of whether a use is adverse or permissive is a question of fact. *Id*.

Woodard argues that he was entitled to a prescriptive easement because he used the woods road continuously and without permission from 1985 until 2003. However, Mrs. Hasley testified that she considered Woodard's use "permissioned" and that she had no objection to his using the road because he "used it seldom." There was also evidence that Mrs. Hasley permitted the road to be traveled out of a sense of neighborliness or rural custom. *See generally Bobo*, *supra*. She testified that she allowed the road to be used because she was being "neighborly," and she thought others, such as hunters or people riding four-wheelers, used "trails" on her property if they were not fenced or posted.

Further, long usage alone is not sufficient to establish a roadway by prescription; other circumstances must be considered. *See Armstrong v. Cook*, 240 Ark. 801, 402 S.W.2d 409 (1966). For example, Woodard testified that he normally used the woods road only six to twelve times per year—during the three-month hunting season and two or three other times a year to access his property for clean-up and maintenance. He also used the road in the late 1980s to bring trucks and bulldozers onto his property when he was building a cabin. But, he said, he did not maintain the road. In affirming a trial court's denial of a prescriptive easement, we have considered that the use of the road has been occasional and limited, and that it has not been maintained by others. *See King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004); *Burdess v. Ark. Power & Light Co.*, 268 Ark. 901, 597 S.W.2d 828 (Ark. App. 1980).

Finally, there is a presumption that the use of wild, unenclosed, and unimproved property, such as Mrs. Hasley's, is permissive. *Carson*, *supra.* The reason for this presumption was explained in *Fullenwider v. Kitchens*, 223 Ark. 442, 445, 266 S.W.2d 281, 283 (1954):

> The reason for the rule that a passageway over unenclosed and unimproved land is deemed to be permissive is sound and also easily understandable .... It assumes that the owner of such land in many instances will not be in position to readily detect or prevent others from crossing over his land, and, even if he did, he might not enter any objection because of a desire to accommodate others and because such usage resulted in no immediate damage to him. Also in such instances the landowner would probably have no reason to think the users of the passageway were attempting to acquire any adverse rights.

Woodard claims that he overcame this presumption by virtue of his many years of open use of the woods road. But, again, it is not only the length of time that must be considered but the circumstances under which the roadway was opened and used. *See Gazaway v. Pugh*, 69 Ark. App. 297, 12 S.W.3d 662 (2000); *Stahl v. Thompson*, 6 Ark. App. 275, 641 S.W.2d 721 (1982); *Zunamon v. Jones*, 271 Ark. 789, 610 S.W.2d 286 (Ark. App. 1981); *see also, generally, Brady v. Perdue*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 21, 2007). The circumstances here indicate that Mrs. Hasley permitted the use of the woods road as a friendly accommodation; that the usage was limited and occasional; that no maintenance was performed by other persons; and that there was no overt indication that Woodard or any other person was claiming a right to the road. Given this evidence, we cannot say that the trial court's denial of the prescriptive easement was clearly erroneous.

Woodard's final argument is that the trial court improperly focused on whether Mrs. Hasley had actual notice, as opposed to constructive notice, of his adverse use of the road.

See generally Fullenwider, *supra*. Because we have already determined that Woodard did not establish adverse use of the road sufficient to grant a prescriptive easement, we need not consider his argument regarding notice of such use. In any event, we do not read the trial judge's findings to say that a property owner is required to have actual knowledge of another's adverse use before a prescriptive easement may be granted.

Affirmed.

GRIFFEN and BAKER, JJ., agree.